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ZYNGA GAME NETWORK, INC.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

REBECCA SWIFT, individually, on behalf of the
general public, and all others similarly situated,

Plaintiff,

v.

ZYNGA GAME NETWORK, INC.;
ADKNOWLEDGE, INC., D/B/A SUPER
REWARDS; KITN MEDIA USA, INC., D/B/A
SUPER REWARDS,

Defendants.

Case No.: CV 09-5443 SBA

**REQUEST FOR JUDICIAL NOTICE
IN SUPPORT OF ZYNGA GAME
NETWORK, INC.'S MOTION TO
DISMISS**

Date: June 29, 2010
Time: 1:00 p.m.
Judge: Hon. Sandra B. Armstrong
Ctm.: 1

Complaint Filed: November 17, 2009

Defendant Zynga Game Network, Inc. respectfully requests that this Court take judicial notice, pursuant to Federal Rules of Evidence 106 and 201, of the following document in support of Zynga's Motion to Dismiss the First Amended Complaint.

1. A true and correct copy of an article quoted in the First Amended Complaint (§ 17) without its context, entitled "My Take on Zynga and CPA Offers," dated November 2, 2009, authored by Mark Pincus, downloaded from the following website <http://markpincus.typepad.com/markpincus/2009/11/my-take-on-zynga-and-cpa-offers.html> (last visited March 1, 2010) is attached as Exhibit 'A.'

1 Federal Rule of Evidence 201 authorizes and directs a court to take judicial notice of any fact
 2 if requested by a party and supplied with the necessary information, provided the fact is not subject
 3 to reasonable dispute and is either (1) generally known within the territorial jurisdiction of the trial
 4 court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot
 5 reasonably be questioned. Fed. R. of Evid. 201(b).

6 Exhibit A is an article quoted by Plaintiff in the First Amended Complaint, but not attached
 7 to the Complaint. Such a document may be judicially noticed as part of a Rule 12(b)(6) motion,
 8 without converting it into to a summary judgment motion, when it is supportive of the defendant's
 9 assertions. *In re Calpine Corporation Securities Litigation*, 288 F.Supp.2d 1054, 1075 (N.D.Cal.
 10 2003) (Armstrong J.); *see also Branch v. Tunnel*, 14 F.3d 449, 456 (9th Cir. 1994) ("[D]ocuments
 11 whose contents are alleged in a complaint and whose authenticity no party questions, but which are
 12 not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to
 13 dismiss") (overruled on other grounds by *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1127
 14 (9th Cir. 2002)). Courts, including this Court, frequently take judicial notice of electronic data,
 15 including websites and emails, that are referred to in complaints. *Sussex Fin. Enterprises, Inc. v.*
 16 *Bayerische Hypo-und Vereinsbank AG*, 2010 WL 94272, *2 fn. 2 (N.D.Cal. Jan 06, 2010) (email); *In*
 17 *re NVIDIA GPU Litigation*, 2009 WL 4020104, *8 & fn. 19 (N.D.Cal. Nov 19, 2009) (websites);
 18 *Hutchinson v. Holder*, 2009 WL 3792311 *35 n. 13 (D.D.C. Nov. 12, 2009) (email); *Postier v.*
 19 *Louisiana-Pacific Corp.*, 2009 WL 3320470, *7+ (N.D.Cal. Oct 13, 2009) (website); *Wible v. Aetna*
 20 *Life Ins. Co.*, 375 F.Supp.2d 956, 965 (C.D. Cal. 2005) (websites).

21 Here, Plaintiff refers to a blog article posted by Zynga's CEO, Mark Pincus. In Paragraph 17
 22 of the Complaint, Swift alleges: "In fact, in a belated acknowledgement that Zynga's ISOTs were
 23 deceptive or worse, Zynga's CEO recently concluded that all such offers would be banned 'until we
 24 see any that offer clear use value.'" (emphasis in Complaint). When part of a writing is offered by
 25 one party, "an adverse party may require the introduction at that time of any other part . . . which
 26 ought in fairness to be considered contemporaneously with it." Fed. R. Evid. 106 (emphasis added).
 27 Here, Plaintiff misquotes the CEO of Zynga, misrepresenting that Zynga purportedly admitted that
 28 no third-party ads had any value to its users. The full blog article makes clear that (1) Pincus

1 believed that “most” ads offered clear user value; and, (2) the excerpted quote referred to mobile
2 subscription ads. Earlier in the article, Pincus stated, “Most of these offers are good for the
3 advertiser and user.” (Ex. A, 4th para.) Plaintiff selectively quoted from a different paragraph of the
4 article where Pincus was referring to “mobile ads” as ones that might not offer any user value. (Ex.
5 A, 6th para.) Accordingly, this allegation, in addition to the conclusory allegation that “most, if not
6 all” third party ads were scams, (FAC ¶ 33) is unfounded, lacks any evidentiary basis, and is entitled
7 to no weight in considering whether Swift has alleged any “facts” to support her factually devoid
8 legal conclusions (*See* Mtn to Dismiss, p. 15, fn. 4).

9 Accordingly, Zynga respectfully requests that the Court take notice of this document.

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11 Dated: March 1, 2010

DUANE MORRIS LLP

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14 By: /s/
15 Richard L. Seabolt
16 Attorneys for Defendant,
ZYNGA GAME NETWORK, INC.

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